No. 2647

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ALASKA COAST COMPANY, a corporation,
Appellant,

vs.

ALASKA PACIFIC FISHERIES, a corporation,
Appellee.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division

Appellant's Petition for Rehearing

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To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The appellant herein respectfully petitions for a rehearing of the above cause upon the question of the allowance to appellee of $6285.00, for the loss in the market price of the salmon involved in this suit, upon the grounds:

1. That the court, in its decision, apparently overlooked the undisputed evidence bearing on this question, and the authorities cited in our brief in support of our objection to such allowance, including a previous decision of this court.

2. That if such allowance is made under the undisputed testimony in this case, it would constitute such a departure from what has been generally recognized and judicially decided to be the measure of damages in such cases, as to make it just to appellant, as well as to carriers and the public generally, that the court state its reasons for making the allowance, in view of the testimony, as a guide in future similar cases.

ARGUMENT.

Appellant would not think of filing a petition for rehearing in this case, which was exhaustively argued in its brief and orally before the court, were it not for the fact that it is fully convinced that, through inadvertance, the court overlooked the importance, on principle, as well as to appellant, of the question of this allowance of damages for loss of market price, and, thereby, not only ordered an unjust allowance against appellant, but, if allowed to stand, its present decision would establish a precedent which would work great hardships upon

carriers, never intended by the court. We feel that it must be true the court overlooked the importance of this question, as well as the undisputed evidence thereon, and authorities cited, otherwise it would certainly have given some reason in its opinion for allowing appellee an item of over six thousand dollars as damages, in spite of the undisputed testimony of appellee's own witnesses that it had not sustained a dollar of such damage.

Practically the whole of the court's opinion is devoted to a discussion of the facts and law bearing upon appellant's liability in this case; but the court does not discuss either the evidence or law bearing upon the proper measure of damages to be applied to such liability. While appellant argued in its brief and orally, against any liability in this case, it did not consider nor argue that as the important question in the case, but most of its argument was directed against the amount of damages allowed by the lower court. This was principally because the question of liability rested largely upon disputed testimony; while, on the other hand the question as to liability for loss of market price rested, not merely upon a failure of proof by appellee, but upon the undisputed, affirmative testimony of appellee's own witnesses.

We accept the court's decision that appellant is liable in this suit "for the loss and damage to appellee's cargo" of salmon; we also accept the court's decision that appellant is liable, on account of such loss and damage to the cargo, for the sum of $4,283.06, being the entire cost of reconditioning the portion of the cargo which was damaged; nor have we ever questioned the allowance of interest on so much of the cost of reconditioning the salmon as appellant might be held liable for, from the time of payment of such cost until the entry of judgment in the lower court; this interest amounting, under the court's decision to $578.20. In other words, we now accept the court's decision finding appellant liable in the sum of $4,861.26, with appellee's costs in the lower court taxed at the sum of $204.90.

But we feel confident the court did not fully consider the further allowance of $6,285.00 "for the loss in the market price of the salmon;" and that if it will give this question the consideration its importance deserves, not only from a monetary standpoint, but for the principle necessarily involved, it will be convinced that this amount, as well as the $1,650.00 disallowed, should not be allowed appellee in this case under the undisputed

testimony, and the unanimous decisions of the courts, including this court.

Our argument in our brief on this question of loss of market price, commences on page 56 and extends to page 107, being the larger part of the argument in the brief. We there cited and quoted from a large number of authorities as follows:

> "Only actual damages, established by proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable."
>
> * * * * * * * *
>
> "Compensation for the actual loss sustained is the fundamental principle upon which our law bases the allowance of damages."
>
> *Moore, Carriers,* (2nd Ed.) pp. 623, 624.
>
> "This universal and cardinal principle is, that the person injured shall receive a compensation commensurate with his loss or injury, and no more; and it is a right of the person who is bound to pay this compensation, not to be compelled to pay more, except costs.
>
> "This principle is paramount. By it all rules on the subject of compensatory damages are tested and corrected. They are but aids and means to carry out this principle; and when in any instance they do not contribute to this end, but operate to give less or more than just compensation for actual injury, they are either abandoned as inapplicable, or turned aside by an exception."
>
> *Sutherland on Damages,* Vol. 1, pp. 17-18.

"The elementary limitation of recovery to a just indemnity for actual injury, estimated upon the natural and proximate consequences of the injurious act, fixes a logical boundary of redress in the form of compensation, and furnishes a general test by which any particulars may be included or rejected. Recovery beyond nominal damages requires that actual injury be shown."

Sutherland on Damages, Vol. 1, p. 127.

"Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of the damages which resulted from it before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages."

Central Coal & Coke Co. vs. Hartman, 111 Fed. 96, at 98.

"A mining company, wrongfully enjoined from operating a mine, is not entitled to recover on the injunction bond profits lost, where it appears that, on account of other mines, operations were not suspended by the injunc-

tion, and that the particular mine would have been worked to an uncertain extent."

U. S. Mining Co. vs. McCormick et al, 185 Fed. 748.

"The general rule is too well settled to require more than the merest reference to authority that only actual damages, established by the proof of facts from which they may be rationally inferred with reasonable certainty, are recoverable."

Hollwig vs. Schaefer Brokerage Co., 197 Fed. 689, 701 (C. C. A. 6th Cir.).

"Where, in an action against a carrier for injuries to a steam shovel during transportation to the place where plaintiff intended to use the shovel in certain contract work, the only notice of special damages given to the carrier that would result from injury to the shovel beyond necessary repairs was from the delay which the carrier was notified would cause a loss of a contract penalty of $50 a day, plaintiff not having suffered such penalty and the contract having been terminated for other reasons and the injuries to the shovel having been fully repaired, plaintiff was only entitled to recover nominal damages."

Simons-Mayrant Co. vs. Atlantic Coast Line R. Co., 207 Fed. 387.

The case of *Magdeburg Gen. Ins. Co. vs. Paulson,* 29 Fed. 530, is especially in point on this question. There, a shipment of rice was damaged because of the unseaworthiness of the vessel. Libellant offered evidence to the effect that this damage

was about 34 per cent of the value of the rice. On the other hand, the ship showed that at very little expense the rice was reconditioned so that with the exception of a few bushels, it was in as good condition and sold for as much as though it had not been damaged. In that case, the Insurance Company had paid the owner the amount of his apparent loss and was subrogated to the rights of the owner, and sued for the amount it had paid, but the court refused to allow this claim, and allowed only the actual loss which resulted from the damage to the shipment.

> "Compensation for the actual loss is the great desideratum in applying the measure of damage in each case to the particular facts therein developed, and no hidebound or technical rules should be allowed to thwart or obscure this purpose, when it can be avoided."
>
> *Gulf etc. R. Co. vs. Godair*, 22 S. W. (Tex. App.) 777.

The following authorities also state the same rule in clear terms:

> "The result of this judgment is to award him his full contract price, allowing him the use of the outfit during the period it would have been gone and the saving of the incidental expenses. In other words, a greater margin or profit by the alleged breach of the contract than he could have made had it been performed. That a judgment of this kind cannot be sustained needs no citation of authorities."
>
> *Kilpatrick vs. Inman,* 105 Pac. (Colo.) 1080.

"The principle of justice, and, as I understand, of law, is, that the party injured is to be compensated, at least to the extent that redress is awarded judicially, for the actual loss sustained. The effort is to reach this measure as near as possible, and unless in cases fit for punitive damages, nothing more than this is to be given."

Crater vs. Binninger, 33 N. J. L. 513.

"Since one who has been injured by the breach of a contract or the commission of a tort is entitled to a just and adequate compensation for such injury and no more, it follows that his recovery must be limited to a fair compensation and indemnity for his injury and loss. And so in no case should the injured party be placed in a better position than he would be in had the wrong not been done, or the contract not been broken."

8 *R. C. L.* p. 434.

The foregoing rule is so fundamental, well established and just that appellee did not question its correctness; and this court recognizes the rule in its decision in this case, when it disallowed the item of $1,650.00 because it is "of the opinion that a loss on this lot of salmon has not been proved."

But it seems to us the allowance of the $6,285.00 claimed by appellee as loss of market price on the balance of this shipment, other than the 5,500 cases sold and covered by the $1,650.00 disallowed, is as little justified as the allowance of that item.

In our brief (pp. 56-60) we showed from the record in the case, that this claim for loss of market price was entirely an after-thought on the part of appellee, made for the first time *more than a year* after the goods arrived, and eleven months after the salmon was all reconditioned and sold and all its damages were known. We also showed that appellee had abandoned its claims for storage and insurance during the period of reconditioning, which were clearly as much recoverable as the loss of market price, because based on the same theory.

We then quoted every particle of testimony in the record bearing on this question of loss of market price, *all of which testimony was given by appellee's witnesses.* We quoted the testimony of Mr. Charles A. Burckhardt, President and Manager of appellee, testifying for appellee, in which the witness stated that he could not say whether or not appellee was "delayed in marketing this salmon by reason of it being overhauled;" but that Kelley-Clarke, appellee's brokers, would be able to give this information. (Brief, pp. 64, 67, Record pp. 178, 179, 188.)

This witness was later recalled by appellee, and was asked on cross-examination if appellee had "suffered any damage whatever by reason of the delay or the time consumed in reconditioning this

shipment; that you lost any market or that you lost any sale?" (R. p. 400.) An objection being made that this was not proper cross-examination, appellant called Mr. Burckhardt as its own witness, and he testified as follows:

His attention was called particularly to paragraph X of the amended libel, where it was alleged appellee had sustained this loss of $7,935.00 by depreciation in market price, and asked if appellee had, in fact, sustained this loss or any part of it. (R. p. 401.) He dodged answering the question for sometime, but admitted that appellee was unable to dispose of this salmon during this reconditioning period; that it did not lose any sale of this salmon nor any opportunity to sell it during that time; that appellee would have had to hold the salmon, store and insure it during this period if it had not been damaged (R. pp. 401-403), and was finally asked this direct question: *"You did not actually suffer that loss, Mr. Burckhardt,"* and answered, *"As I stated before, I do not think we suffered any loss"* (R. p. 404.) He testified that he did not think appellee had sold any of the "Jeanie" salmon during this period, but admitted that if Mr. Small had so testified, it was probably true, as he would know. (R. p. 405.) He also admitted

that appellee had a large amount of the same brands of salmon in its warehouse at Seattle, unsold, and for which appellee had no sale, and he was asked this question:

> "Q. We want to be perfectly fair here, Mr. Burckhardt. Is it not a fact that in making up this computation that you have just taken the amount of salmon, and you figured up the market value of it, the day it arrived and you then figured up the market value the date when the reconditioning was entirely completed, and that you put that sum in irrespective of any sale or prospective sale?
>
> A. Well, I would say that we did.
>
> Q. (Judge Hanford). Have you been advised by your counsel that that is the legal measure of the damages, and that you were entitled to recover that under the law?
>
> A. Yes, sir.
>
> Q. (Mr. Bogle). So that the question of sale or possible sale or purchase of this salmon did not enter into it at all?
>
> A. No, sir." (R. pp. 407-408.)

We also quoted the testimony of Mr. Small, Kelley-Clarke's man who handled the sale of all this salmon for appellee, and testified for it in this case, in which he stated:

> "Q. You had plenty of other salmon of the same grade?
>
> A. Yes.

Q. Then, as a matter of fact, Mr. Small, did the Alaska Pacific Fisheries lose any market or lose any sale of salmon because of damage to the 'Jeanie' salmon?

A. I can't say that they did; no, sir." (R. pp. 304-305.)

He further testified that during this reconditioning period "we had a very ragged market and there were quite a good many goods."

"Q. That was because of the condition of the market?

A. Yes. The market conditions were very unhappy during the spring of 1913.

Q. That had nothing to do with the damage of the Jeanie—

A. (Interrupting). Not a particle; that had no bearing whatever.

Q. It had no bearing upon the sale of the pack of the Alaska Pacific Fisheries?

A. Not at all. The condition of the 'Jeanie' cargo, after it was properly overhauled, was in just as good condition as any salmon there was packed.

Q. I mean the fact that this salmon was damaged did not affect the sale of the pack by the Alaska Pacific Fisheries?

A. No, sir; not at all.

Q. And the delay in reconditioning the salmon did not affect the returns which they got from it?

A. Not at all." (R. pp. 307-308.)

It seemed to us this testimony, given by the President and General Manager of Appellee Company, and the salesman who had sole charge of all sales of this salmon, and knew all the facts about such sales, as Mr. Burckhardt testified, entirely and effectually disposed of this entire claim for loss of market price, under the rules of law above referred to.

If appellee did not *"lose any market or lose any sale of salmon because of damage to the 'Jeanie' salmon," "and the delay in reconditioning the salmon did not affect the returns which they (appellee) got from it," and appellee "did not actually suffer that loss,"* how could a judgment for damages for such loss, *or any part of it* be sustained, without shocking one's sense of justice, and violating the fundamental and universally established rule for the allowance of damages? And as the whole includes all the parts, this undisputed testimony from appellee's witnesses, that *no loss whatever* was sustained from loss of market or market price, seemed to us to make further argument on that question unnecessary.

It was not merely a failure of proof of damage, for which this court disallows the item of $1,650.00, but it was affirmative proof, positive and undis-

puted, on appellee's part that it had *not sustained any damage whatever* on this account, either as to the 5,500 cases sold or the balance which it was unable to sell, *not because of its damaged condition, but because there was no purchaser for any part of it, and therefore no market for it.*

But we did not rest our argument on this question here. We considered this our strongest, in fact unanswerable and unanswered point on the appeal, because the law seems clear, and the facts so simple, undisputed and coming wholly from the other side. But we had been defeated in the lower court on this question, because, as we believe, the lower court did not carefully consider the question; its decision on this question being based on the theory that "The law presumes a loss equal to the depreciation in market value during the period of detention." (R. p. 492.)

While we felt there could be no award of damages based on a presumption alone, when the positive, undisputed testimony of appellee's witnesses was that such a presumption was untrue in fact, therefore leaving no room for the presumption; nevertheless, we felt that we should go further into the testimony, and show that the general statement of these witnesses, that there was no loss of market

or market price, was true as shown by the particular testimony given by appellee's witnesses on this question.

For this reason, we pointed out that appellee's testimony showed the sale and delivery of these 5,500 cases of Chums, before there was any drop in the so-called "market price" of this brand of salmon; therefore, there was no actual loss of market price on these cases; this substantiated, to the extent of these cases, the general statement of the witnesses that there was no loss of market price on any of the shipment.

Of the balance of the cargo, 14,373 cases were "Pinks," upon which no such loss was claimed. The total "Chums" in the shipment were 10,498 cases, of which 5,500 cases were sold without loss, leaving only 4,998 cases of "Chums," upon which any loss of market could be figured. The 10,498 cases of "Chums" in this cargo were composed of 3,511 cases of Trolling brand and 6,987 Spear brand, (Brief p. 92); the 5,500 cases sold were 4,000 Spear brand and 1,500 cases of Trolling brand, so that the 4,998 cases unsold consisted of 2,987 cases of Spear brand and 2,011 cases of Trolling brand.

We also showed that only 1,610 cases of these 4,998 cases were damaged at all; leaving 3,388 cases

wholly undamaged, that appellee had on hand at Seattle when this shipment arrived, 17,767 cases of this "Chum" brand, 5,298 cases being Trolling, 5,272 cases being Spear and 4,992 cases being Antler brand. Of this Antler brand, 3,000 cases were sold with the 5,500 cases Spear and Trolling in February.

We further showed that appellee *was unable to sell a single can* of this "Chum" salmon during any of the time from the arrival of this shipment January 8th until all reconditioning was completed on March 20th, other than these 8,500 cases sold in February. In other words, during this period, appellee *could not sell a can* of the 5,298 cases of Trolling, or the 5,272 cases of Spear or the 1,992 cases of Antler not sold, which appellee already had on hand. Nor during this period could appellee sell a can of the 3,388 cases of "Chums" of this shipment which were not damaged at all.

By the opinion filed in this case, the court allows the entire cost of reconditioning the 1,610 cases of "Chums" damaged, and in addition thereto allows a damage for loss of market of 30 cents per case on these 1,610 cases of "Chums," damaged and also 30 cents per case on the 3,388 cases wholly undamaged; when appellee could neither sell one of these 3,388 cases, nor one of the 14,767 cases of

other "Chums" on hand when this shipment arrived. The allowance is made for loss of market price, when appellee had no market for a can more than it actually sold, and is made in addition to the total cost of reconditioning the few cases damaged. It is also made without any testimony showing when all damage to this "Chum" salmon was repaired, so as to make it all available for sale, after which time certainly, appellant could not be held liable, in any event, for any drop in the market.

Turning to the "Medium Reds," we showed that of 4,786 cases of this salmon in the shipment, *only 498 cases were damaged at all,* leaving 4,288 cases wholly undamaged and available for sale at all times. We also showed that appellee had on hand unsold when this shipment arrived, 4,014 cases of this grade, making a total of 8,302 cases of this grade always available for sale, and yet appellee was able to sell of this grade during this period *only 708 cases in all.* (Brief p. 91.)

In spite of this uncontradicted testimony given by appellee's witnesses, and in the absence of any showing when the 498 damaged cases of "Medium Reds" were reconditioned, so that it was all available for sale, when appellant's liability for loss of market would certainly cease, the decision of the

court allows a damage of $4,786 for loss of market price of the "Medium Red" salmon, in addition to the entire cost of reconditioning the 498 damaged cases.

Almost half the damage to this shipment was to the "Pinks," which did not drop in price (1,980 cases out of 4,088 damaged). (Brief p. 93.) Under the rule that a shipper is bound to lessen his damage as much as possible, appellee was bound to first recondition the few damaged cases of "Chums" and "Medium Reds," the asking prices of which were dropping, leaving the "Pinks" until the last, because their asking price remained the same. Nor could it charge appellant with loss of market price of "Chums" and "Medium Reds," especially on nearly 7,600 cases of those grades, wholly undamaged, while it was reconditioning the 1,980 cases of "Pinks" for which it had no sale, and the asking price of which did not drop at all.

The foregoing statements of fact were all set forth in our brief, with references to the record to sustain every item, and no question has ever been raised about the correctness of these statements. The statements are based entirely upon the testimony of appellee's witnesses, and are uncontradicted. These figures certainly show in detail

and conclusively the truth of the testimony of Mr. Burckhardt and Mr. Small that appellee did not sustain a dollar of damage on account of loss of market or market price of the salmon in this shipment; and we cannot believe this court, after fully considering these facts, would award appellee $6,285.00 as damage for loss of market price, in addition to the entire cost of reconditioning the damaged cases, thereby placing appellee in a better position by 30 cents per case for the "Chums" and $1.00 per case for the "Medium Reds" in the shipment, than if there had been no damage at all; also giving appellee 30 cents per case more for the "Chums," and $1.00 per case more for the "Medium Reds," in this shipment than it received or could obtain for the same grades it already had on hand unsold at Seattle, when this shipment arrived.

In our brief, we urged other reasons why this allowance could not be made, none of which reasons are mentioned by the court in its decision, but which, we believe were overlooked by the court.

We pointed out that the evidence wholly failed to show any "market price" for this salmon, within the legal meaning of that term. We referred to the testimony of Mr. Small, appellee's witness, showing that the so-called "market price" for salmon was

merely the *asking price,* fixed by the sole owners of canned salmon, not the price at which the salmon, even in small quantities could be sold. (Brief pp. 73-75.) He stated that the Alaska Packers' Association of San Francisco, the largest packer of salmon on this coast, after considering the probable extent of the season's pack, and the demand therefor and general business conditions, sent out a circular fixing the price at which it would sell its salmon of various brands and grades, and that the little dealers, which included those represented by Kelley-Clarke, who handled all of appellee's pack, were forced to sell their salmon at this price. Whether or not there was an express agreement between all of these dealers in fixing this price, at least there was such a common understanding among them as to amount to an agreement to arbitrarily fix the price at which they would sell the only available canned salmon in these markets. They maintained this price and compelled persons desiring to purchase salmon on this coast to pay the same or go without, until about the middle of February, 1913, when the owners of salmon, being unable to dispose of their pack at these prices, and in order to induce purchasers to take it off their hands before the next season's pack came in, commenced to reduce their

price; but even then they were unable to dispose of the pack until they had put their price down to such a figure as purchasers were willing to pay.

At the time of the arrival of this salmon and during the entire period it was being reconditioned, there were no purchasers who were willing to pay the prices asked for these grades of salmon, except for small quantities thereof. It was absolutely impossible for appellee to have sold this entire cargo, or any considerable portion of it, at any of the prices named by Mr. Small, as the market price during the period of reconditioning.

It would not seem to be necessary to cite authority that there can be no market for an article of commerce, nor a "market price" therefor, unless there are persons willing to purchase the article at the price the owner is willing to sell for. A market cannot be made by either seller or purchaser alone, nor can the market price of an article be determined alone by what the owner is willing to take or a buyer is willing to give.

> "In order to say of a thing that it has a market value, it is necessary that there shall be a market for such commodity; that is, a demand therefor, and an ability from such demand to sell the same when a sale thereof is desired. Where, therefore, there is no demand for a

thing, and no ability to sell the same, then it cannot be said to have a market value."

8 Ruling Case Law, 487-488.

The definition of the term "market value" is well stated as follows:

"The 'market value' of a commodity, in its last analysis, means the price which it will bring in cash from a buyer who is willing to pay its value."

Parish & Co. vs. Yazoo R. Co. 60 So. 322.

In the case of *Kountz vs. Kirkpatrick,* 72 Pa. St., 376, the court discussed the testimony as to the market value of oil. It appeared in that case that dealers in oil had bought up large stocks of available oil for the purpose of holding up the price, and fixed an arbitrary price at which they were willing to sell. The court quoted the following definition of "market price:"

"To make a market, there must be buying and selling, purchase and sale. If the owner of an article holds it at a price which nobody will give for it, can that be said to be its market value? Men sometimes put fantastical prices upon their property. For reasons personal and peculiar, they may rate it much above what any one would give for it. Is that the value? Further, the holders of an article, flour, for instance, under a false rumor, which, if true, would augment its value, may suspend their sales, or put a price upon it, not according to its value in the actual state of the market, but

according to what in their opinion will be its market price or value, provided the rumor shall prove to be true. In such a case, it is clear, that the asking price is not the worth of the thing on the given day, but what it is supposed it will be worth at a future day, if the contingency shall happen which is to give it this additional value. To take such a price as the rule of damages, is to make the defendant pay what in truth never was the value of the article, and to give to the plaintiff a profit by a breach of the contract, which he never would have made by its performance."

The court then discussed the evidence in that case of the fixing of the price at which holders of oil were willing to sell, and held that this evidence did not show a market price.

In the case of *Lovejoy vs. Michels,* 40 N. W. (Mich.) 901, recovery of the reasonable value of goods was sought; the evidence of value was the price fixed by a combination of dealers to fix prices of these goods. The court said:

"The trial judge heard and submitted the case upon the theory that a combination to fix prices was not unlawful if the purpose was to fix reasonable prices, and when defendant sought to show that the prices fixed were not fair market prices, and were above the market value, the court refused to permit him, and restricted him to the market price, when, as a matter of fact, the association embraced all the manufacturers, and the only 'market price' was

that fixed by the association. In *Richardson vs. Buhl,* 77 Mich. 632, 43 N. W. Rep. 1102, this court held that any combination to control prices was unlawful, as against public policy. In the present case, as in that, it was claimed that the combination had in fact reduced prices, and upon that point the court say: 'It is no answer to say that this monopoly has in fact reduced prices. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of the corporation at any time to raise the price to an exhorbitant degree.' In the present case no price was agreed upon at the time the order was given, and there was no evidence tending to show that defendant had any knowledge of the price fixed by the association. An attempt is made to fasten a price fixed by a combination upon such a purchaser. It is sufficient to know that the price sought to be imposed is that fixed by the combination. If so, it was unlawfully fixed, and has no force as a market price, for that reason. It is the combination for the purpose of controlling prices that is unlawful, and the fact that they, the manufacturers, deemed the prices fixed to be reasonable, does not purge it of its unlawful character. Independently of the unlawful character of the combination fixing it, a price so fixed cannot be regarded as any better evidence of value than that fixed by any vendor upon his own wares. A price so fixed is not to be entitled to rank as the market price. It is not a market price, within the contemplation of the law. The market price of an article manufactured by a number of different persons is a price fixed by buyer and seller in an open market, in the usual and ordinary course of lawful trade and competition. It cannot be divested of these incidents, and retain its char-

acter. Associations of this character give the buyer no voice, and close the market against competition."

In the case of *C. R. I. & P. Co. vs. Broe,* 86 Pac. (Okl.) 441, the court discussed the term "market value" as used in a statute fixing the measure of damages for delay in shipments of merchandise. The shipments under consideration there were large quantities of nails and wire, but the only evidence of market value was what the nails and wire would sell for per pound. The court said:

"The evidence on this point did not conform to the rule for determining such value. The market value, as applied to the case at bar, in contemplation of law, would have been what the different articles of merchandise would have sold for in bulk in the open market at Lawton on the different dates. The law does not contemplate that the carrier shall be liable for the value of merchandise if sold at retail. Such a rule would make the carrier liable, not for the market value of goods as sold in car load lots or in quantities as carried by it, but would also add to and include the profits of the sales at retail, without taking into consideration the costs incident to such sales. There was no evidence before the jury by which it could determine the difference in the value of the articles in question when sold in bulk and when at retail. The case was tried upon the theory that the retail market should control. The court gave the jury no instructions as to this matter, and in the light of the entire record we must conclude that the jury understood that by 'mar-

ket value' was meant the value which such articles sold for in the retail trade. The damages were estimated by an improper standard."

"No element of loss can be considered in the computation of damages, that is not clearly and unqualifiedly proved. * * * So, where there is no market price for an article, damages cannot be computed upon the belief of plaintiff, or other witnesses, more or less probable, that the commodity contracted for, and not delivered, could have been sold for a certain price."

Iron City Tool Works vs. Welisch, 128 Fed. 693 (C. C. A. 3rd.)

"If the goods have no market value, the measure of damages (for injury to goods) is usually the cost of reproducing and replacing the articles, if this can be done;"

Elliott on Rys., Sec. 1734 (2nd Ed.).

The rule laid down in these authorities has not been questioned, and we cannot believe the court fully considered the same or the evidence, when it stated that the "market value" of this salmon was $85,630 when the shipment arrived, and fell to $77,695 when it was all reconditioned.

We also argued in our brief that the rule of difference in "market value" between the time of arrival and time the damage is repaired has no application to a case of damage to a shipment, but only where there has been a *delay* in arrival. In support of this contention we cited a number of

authorities. (Brief pp. 94-95.) Among other cases we cited the case of *The Berengere,* 155 Fed. 439, in which Judge Wolverton expressly stated:

> "The rule, however, is otherwise where there has been no delay, and the cargo is damaged through fault of the carrier. In such case the measure of damages is the difference between the value of the goods in their damaged state and their value at the port of destination, had they been delivered in good order."

He quoted from the case of *The Compta,* 6 Fed Cas. p. 233, No. 3070, as follows:

> "The shipowner by the bill of lading does not enter into any agreement with the owner of goods that may be damaged to go into a joint speculative operation founded upon the anticipated state of the market at some indefinite future time, to be judged of by the shipper, who retains in his own hands the whole conduct of the adventure. Such a rule would impose on the shipowner obligations and liabilities little suspected by persons engaged in that business, and of which his contract by bill of lading contains no hint. The only safe, rational, and equal rule is to hold, as before stated, the vessel liable for the difference between market value of the goods, if sound, and their value in their damaged condition at the time and place of delivery."

Both of these cases are cited and approved by this court in the case of *United S. S. Co. vs. Haskins,* 181 Fed. 962, 965, and we do not believe the court considered these cases or intended to

overrule its former decision, or hold contrary to the authorities there cited and approved, although that would clearly be the effect of its decision heretofore rendered herein.

In this case, as there was no market for this cargo of salmon, that is, no one who would buy it at the prices appellee asked, and it was shipped only to be held until it would be sold, and, therefore, there was no "market value" within the rule of all the decisions, appellee first made its claim under the proper rule applying in such case, to-wit: the cost of repairing the damage, which the court has allowed. But long after this claim was made, and this suit commenced, as an afterthought, it claimed additional damages under the rule applying only where there has been a delay in the transportation.

We also argued that there was no competent evidence of "market price," for the reason, besides those already referred to, that the testimony was as to the price at retail per case, which could not be applied to a shipment of nearly 30,000 cases.

C. R. I. & P. R. Co. vs. Broe, supra.

All of these points were raised and argued at length in our brief, and to some extent on the

oral argument. Appellee has never questioned our statement of the facts and record, nor cited any authorities holding contrary to those cited by us; nor did it cite any authority to sustain its contention that the measure of damages in such a case as this, is the cost of repairing the damage *plus* the loss of market price; nor to show that there was any loss of market price in fact, nor to sustain its contention that it could recover damages it expressly admitted it did not sustain.

It has seemed to us the proper view to take of this question, under the settled law, as we understand it, is this: Assume appellant liable for all actual loss appellee suffered by reason of the damage to this salmon, what would place appellee in the same position as though there had been no damage? Clearly, under the evidence, if the shipment had been delivered in perfect condition, appellee would not have sold a case more than it did in fact sell, either of the "Jeanie" salmon or what it already had on hand; nor would it have received a dollar more for any of its salmon than it did in fact receive. Clearly, therefore, its *sole and entire loss* by reason of the damage to this shipment was the cost of repairing the damage, $4,283.06, with interest thereon from date of pay-

ment to the time a correct judgment therefor in the lower court should have been entered, to-wit, from April 8, 1913, to July 12, 1915, and costs in the lower court. To allow anything more than this, would be to place appellee in a *better position* than if the shipment had not been damaged at all; give it a better price than it would otherwise have received for this salmon, and better than it could or did receive for other similar salmon already on hand, available for sale, but which could not be sold. Of course, the fact that appellee had this other salmon already on hand available for sale, but which it could not sell, is material under the evidence in the case, only as it shows there was no market for the "Jeanie" salmon, even if undamaged, and therefore there was no loss of market price, for which appellee should be compensated.

After reading the court's opinion in this case, we are firmly convinced the court overlooked the facts and rules here referred to. We cannot believe that it would disallow an item of damage because appellee had failed to prove it sustained such a loss; and intentionally allow the same kind of damage on other cases of this shipment, when appellant's proof, not only failed to prove such damage, but expressly, both in terms and in detail,

showed affirmatively that it *had not* sustained a dollar of such damage. The court certainly would not render such a decision without even a mention of the rules of law referred to, or the undisputed facts, if it had understood the facts and the importance of its decision on this point, not only to appellant, but to carriers and the public generally.

For these reasons, believing as we do that the court has unintentionally overlooked the most important point in the case, and rendered a decision on this question, which would not only work a great injustice to appellant, but constitute a precedent for most unjust claims against carriers, we respectfully ask the court to grant a rehearing of the case on this question of the allowance of any damage for loss of market price.

Dated Seattle, Washington, September 27, 1916.

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,
Proctors for Petitioner.

APPELLANT'S ANSWER TO PETITION OF APPELLEE FOR REHEARING.

Appellee has served us with a petition for rehearing on the question of costs on appeal and interest pending appeal. If appellant's foregoing petition should be allowed, and the court's decision modified as requested by appellant, that, of course, would dispose of appellee's petition. If, however, appellant's petition is denied, and the court considers appellee's petition, we respectfully submit the same should be denied.

COSTS ON THE APPEAL.

The decision of the court awarding costs to appellee, clearly refers to its costs in the lower court. The judgment of the lower court was for a total sum "and costs;" the decision of this court cut this total sum down $1,650.00, and ordered a new judgment for the balance, and appellee being entitled to its costs below, the court necessarily so provided.

Under the rules and practice of this court, the costs on appeal follow the reversal of the judgment of the lower court.

Benedict, Adm. (4th Ed.), Sec. 587.

> "The appellant was put to the necessity of an appeal to secure a proper modification of the decree. * * * There is no good reason why the appellant shall be required to bear the costs of a necessary appeal."

The Umbria, 59 Fed. 475.

> "Where the decree in the lower court is in favor of the appellee, and appellant secures a modification of the decree of the lower court, appellant is entitled to recover its costs in the appellate court against the appellee."

The Strathleven, 213 Fed. (C. C. A.) 979.

The Horace B. Parker, 76 Fed. (C. C. A.) 238.

In this case appellant was compelled to incur the expense of an appeal in order to avoid paying the $1,650.00 improperly allowed by the lower court. It should not be penalized by paying the costs of the appeal, when compelled to appeal and doing so successfully.

It is stated in appellee's petition for rehearing that the attention of the lower court was not directed to the point upon which this court reversed the judgment of the lower court.

The same statement was made in appellee's brief on this appeal, and orally before the court during the argument. At that time we disputed the statement, and read to this court an excerpt from

our office copy of our typewritten brief served and filed in court below, which expressly referred to this point, and the pages of the testimony bearing thereon; thereby showing that the point was expressly raised below in the brief, aside from our claim that it was also raised on the oral argument below.

Appellee has not disputed our statement as to the excerpt so read, which could be done if we were incorrect in this statement, either by sending up for inspection our original brief below, which is on file there, or producing the copy served on proctors for appellee. Not having done either, we believe our statement on this question should be considered correct.

Appellant assigned error on the allowance of *any part* of the $7,935.00 for loss of market price, because not warranted by the evidence and the law applicable thereto. It was not obliged to pick out each particular item of such allowance and assign error separately as to each item. Such a practice has been condemned. Its assignment challenged each part of this item, and covered the argument following against each part thereof.

This case is not like the case of the *"Argo,"* 210 Fed. 872, in which the lower court was sustained, except in the allowance of interest on an

award of damages for a tort. In this case the court erred in allowing a large sum as damages; appellant was compelled to appeal, to avoid paying this amount, and the question involved the consideration of questions of fact and law. Being successful, under the authorities, it is entitled to recover costs on appeal.

INTEREST PENDING APPEAL.

No reason can be given for compelling appellant to pay interest pending the appeal, on the amount this court finds appellant should pay. Interest is a penalty for non-payment of what is justly due, *after that amount is determined.* The amount found by the lower court was not justly due; and appellant could not pay the judgment and avoid the penalty of interest, without paying a large amount this court finds it should not pay. To compel it to pay interest pending the appeal, would be to penalize it for refusing to pay what it did not justly owe. Appellee unjustly claimed a large amount, which it compelled appellant to pay or come to this court for relief. The decision of this court is a final determination of the amount due from appellant, and interest should run on that amount only from the date of the entry of judgment there-

for, when for the first time appellant can pay and avoid interest.

Johnston vs. Gerry, 34 Wash. 525, 76 Pac. 258, 77 Pac. 503.

The Grapeshot, 10 Fed. Cas. No. 5,703.

We respectfully submit that appellee's petition for rehearing should be denied.

W. H. BOGLE,
CARROLL B. GRAVES,
F. T. MERRITT,
LAWRENCE BOGLE,
Proctors for Appellant.

United States of America, Western District of Washington, County of King—ss.

I, F. T. MERRITT, one of the proctors for the appellant in this cause, do hereby certify that I am counsel for the Petitioner named in the foregoing petition for rehearing in said cause; that in my judgment the said petition is well founded in point of law as well as in fact, and that said petition is not interposed for delay.

Dated Seattle, Washington, September 27, 1916.

F. T. Merritt

Of Counsel for Petitioner.